

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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 IN RE: :
 FOSAMAX PRODUCTS LIABILITY LITIGATION : No. 06 MD 1789 (JFK)
 -----:
 This document relates to: : **MEMORANDUM OPINION**
Secrest v. Merck & Co., Inc., : **AND ORDER**
No. 06 Civ. 6292 (JFK) :
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JOHN F. KEENAN, United States District Judge:

This is one of over 900 cases consolidated before this Court for coordinated pretrial proceeding in the In re Fosamax Products Liability Litigation multidistrict litigation. This case is set for trial on September 7, 2011, and today the Court heard oral argument and issued rulings on the parties' in limine motions.¹ The Court reserved decision on plaintiff Linda Secrest's ("Secrest") motion to preclude defendant Merck Sharp & Dohme Corp. ("Merck") from introducing testimony or evidence about disciplinary proceedings against Dr. Steven Alexander conducted by the Florida Department of Health.

Dr. Alexander was Secrest's dentist and performed a number of procedures on her prior to 2002. As a result of his treatment of Secrest, an administrative complaint was filed against Dr. Alexander with the Florida Department of Health. Dr. Alexander settled this complaint with the Florida Department

¹ The facts of this case are fully explained in my Opinion and Order addressing Merck's summary judgment motion and the parties' Daubert motions of today's date.

of Health and in doing so, admitted certain allegations regarding the manner in which he treated Secrest.

In this case, Secrest contends that she developed osteonecrosis of the jaw in June 2004 as a result of her use of Fosamax. Merck contends that Secrest's injuries are attributable to her chronic history of infections rather than her use of Fosamax, and intends to introduce opinion testimony from Dr. Norman Betts in support of its theory that Dr. Alexander's treatment caused Secrest to experience an infection that led to her injuries. In Merck's view, Dr. Betts based his expert opinion in part on factual admissions made by Dr. Alexander in his settlement with the Florida Department of Health.

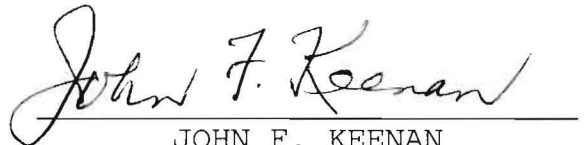
Plaintiff argues that the statements are inadmissible hearsay and that informing the jury about the disciplinary proceeding would be unfairly prejudicial while having little probative value. Fed. R. Evid. 403, 802.

The Court grants this motion in part and denies it in part. These statements are admissible despite the Hearsay Rule because Dr. Betts has based his opinion testimony on these admissions, and because medical experts often rely on statements made by treating physicians about a course of treatment. Fed. R. Evid. 703. The admission of this evidence will not be unfairly prejudicial because the Court issues the following limiting

instruction: Merck may not refer to the Florida Proceedings as disciplinary in nature but may introduce factual admissions made by Dr. Alexander in his settlement with the Department of Health that form the basis of Dr. Norman's opinion on the causation of Secrest's alleged injuries. (See Df.'s Mem. Opp. Pl.'s Mots. in Limine 7-8, ECF No. 204.) Merck may not refer to the fact that these statements were made in a disciplinary proceeding or to whether Dr. Alexander was determined to have failed to meet "prevailing peer performance standards." (Pl.'s Mem. Supp. Pl.'s Mots. in Limine 14, ECF No. 195.) Both parties are directed to refer to the Dr. Alexander's statements--if at all--simply as "statements made in another proceeding in Florida."

SO ORDERED.

Dated: New York, New York
August 30, 2011



JOHN F. KEENAN
United States District Judge